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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 243

SOLOMON G. SALOMON,

Petitioner,

—against—

THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SOLOMON G. SALOMON,
Petitioner pro se,
No. 18 Pine Street,
Woodmere, N. Y.

THE COURT PRESS, N. Y. C.

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FOREWORD.

Intervening events made it unnecessary for this Court to establish the decision and mandate of the Circuit Court of Appeals in *Murray* v. *Roberts*, (103 F. 2d 889), as the law of the case in the Interborough Receivership.

Murray, the Interborough Receiver, filed a petition for certiorari, (No. 552, October Term, 1939). The petition was dated November 24, 1939 and on December 14, 1939, in conjunction with others, he moved this Court to defer consideration thereof because of the existing contract of The City of New York to buy securities of the Interborough Rapid Transit Company and of the Manhattan Railway Company which was in ancillary receivership with Roberts as receiver.

Murray's said petition was withdrawn about September, 1940. 311 U.S. 720 Nos 6 and 7

The said motion to defer consideration, stated that the said contract had become effective on November 22, 1939, pursuant to the laws of the State of New York, because of the exercise by the Transit Commission, (a state administrative body), of its jurisdiction conferred by state laws.

During the possession by the District Court of the Interborough and Manhattan estates, said receivership court had permitted many millions of dollars to be paid on account of Interborough bonds and 7% notes, as interim distributions out of the Interborough Estate, with the right of recapture if the payments proved to be erroneous.

Said distributions were mistakes, according to the decision in *Murray* v. *Roberts, supra.*

The brief on behalf of Roberts, in opposition to Murray's said petition for certiorari, shows, (on pp. 27 and 28 thereof), that the distributions were made at the expense of Manhattan Railway Company, your petitioner and others similarly situated, and that the distributions should have been recaptured and redistributed under said mandate.

The petition hereinafter is motivated by the refusal of the Circuit Court to hear your petitioner's appeal to it from the refusal of the District Court to have the proceedings required by the decision and mandate in *Murray* v. *Roberts*.

The parties who opposed such proceedings are The City of New York, J. P. Morgan *et al.* and Guaranty Trust Company who represented the Interborough bondholders in the receivership, J. Herbert Case *et al.* who represented Interborough 7% noteholders in the receivership, and Van S. Merle-Smith *et al.* who represented Manhattan Consolidated Mortgage bondholders in the receivership and who, by agreement with the City and the other two committees, brought about an unjustified foreclosure of said mortgage.

Merle-Smith *et al.* and the trustee of the Manhattan Consolidated Mortgage, by their respective counsels, joined in said brief on behalf of Roberts, but, nevertheless, they recommended to, and obtained from the District Court the said foreclosure of said Consolidated Mortgage. They did this in order to effectuate the Plan they entered into, with the City and the said other two committees, to effectuate transfer of title to the City of certain parts of the Manhattan Estate via said foreclosure, (see 122 F. 2d 454 at p. 457), instead of in the manner prescribed in the New York statute upon which the Plan, purportedly, is based,—*i. e.*, Article VII, New York Public Service Law, Section 123-2, see note, *infra*, page 4.

IN THE

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OCTOBER TERM, 1943.

No.

SOLOMON G. SALOMON,

Petitioner,

—against—

THE CITY OF NEW YORK, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Circuit Court of Appeals, Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Solomon G. Salomon, respectfully represents:

Statement of the Case.

(a) Preliminary Statement; (b) Fundamental Facts; (c) Receivership History to July 24, 1939; (d) History of the Plan and Agreement; (e) i, My appeal, 122 F. 2d 454; ii, The Circuit Court's refusal to decide my points; (f) My petition to the District Court to perform its unperformed duties as Receivership Court; (g) The chicanery of the City of New York, et al.; (h) The refusal of the Circuit Court to decide the unanswered, fundamental and precise questions of authority and jurisdiction drawn to its attention.

(a) Preliminary Statement.

Inability to pay the Interborough 7% and 6% notes at their maturities on September 1 and October 1, 1932, was the ostensible reason for the Interborough Receivership.* The hidden but actual main purposes, evidenced by

* American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.

the conduct of the receivers and the Morgan Committee throughout the receivership, were to rid Interborough of the Manhattan Lease; to rid it of its obligations under the franchises of its elevated railway division for the extentions of, and additional tracks on, the original elevated railway; and to rid it of its obligations under its contracts undertaken in connection with obtaining the franchises for the extensions and additional tracks.

When Manhattan Receiver Roberts prevailed in preventing Interborough Receiver Murray and the Morgan Committee from achieving said purposes, (after the City had reluctantly become a party to the receivership and it had joined in Roberts' defenses), the Morgan Committee entered into a contract with The City of New York, Van S. Merle-Smith *et al.*, and J. Herbert Case *et al.*, to enable the City to acquire such majorities of the securities issued by the Manhattan Railway Company and Interborough Rapid Transit Company, under the provisions of subdivision 12, §124, Article VII of the Public Service Law, as to enable the City to take over the two companies (lock, stock and barrel), as provided in subdivision 2, §123, of said Article and Law. (See note below.)

R.–10 Fed. Supp. 512.

NOTE—Unification Statute—Article VII New York Public Service Law

§123-2. * * * *Any railroad company included in the plan may, with the consent of* the holders of record of *at least two-thirds of its outstanding shares* of stock entitled to vote thereon given as provided in section 148 of the railroad law *transfer its property* * * * *or any part thereof to the City* * * * *subject,* however, *to the right of appraisal of the shares of any dissenting stockholder* as provided in section 161 of the railroad law.

§124-12. Securities acquired by city. *If, pursuant to a plan, the city shall become the owner* or holder *of securities of a corporation owning the railroads to be acquired under the plan,* or the securities of a corporation holding the securities of such owning corporation, or securities to which such railroads are subject, *such securities shall be delivered into the custody of the comptroller of the city. The city, acting by the local authority or by such person or persons as the local authority may designate, may exercise such powers with respect to such securities as might any other holder hereof.* (Italics by petitioner.)

But, since the Manhattan Railway Company, as a matter of Equity, remained solvent, thanks to the decision and mandate in *Murray* v. *Roberts* (103 F. 2d 889), the parties to the said contract agreed to try to persuade the District Court, and did persuade the District Court to allow foreclosure of the Manhattan senior mortgage, notwithstanding the fact that the only defaults in respect to the mortgage were established or actual mistakes of the District Court.

The said foreclosure and all the other proceedings, orders and decrees connected therewith, it is contended, constitute a fraud on Manhattan Railway Company, your petitioner and all persons similarly situated.

Your petitioner and his wife own over 500 shares of Manhattan Capital Stock; and since before the receivership, throughout it and now are the owners of substantial amounts of the two issues of Manhattan bonds as well as stock. Their son, George F. Salomon, is the owner of some 320 shares more, which he acquired with his own means, none of which were received directly or indirectly from his parents. Interborough guaranteed to pay the owners of the said shares $7.00 annually per share, in quarterly instalments on January, April, July and October 1st of each year for over 900 years.

(b) Fundamental Facts.

1. The Equity Receivership commenced on August 26, 1932 on the Bill of Complaint of The American Brake Shoe and Foundry Co., a Delaware corporation. Thereafter and until June 12, 1940 when, by order of the District Court, the railroads were turned over to the City, the Interborough Receivers operated all the lines and routes theretofore operated by the Interborough Company. The District Court is that for the Southern District of New York.

2. Before 1913, all Interborough's railroads were leased

lines, belonging, respectively, to The City of New York and Manhattan Railway Company. After March 19, 1913, Interborough extended some of the latter's lines, under an agreement with the City. The company undertook to connect them with and to operate them in conjunction with parts of City-owned lines.

3. In order to fulfill said agreement, Interborough applied to the Public Service Commission under Section 24 of the Rapid Transit Act of the State of New York (L 1891, c, 4 as amended), for the enabling franchises (Appendix A). (See note below.)

4. In paragraph 1 of said Sec. 24, the Act provides, generally, that a lessee of lines, actually operating them, may be granted franchises to extend its said lines on condition that it thereafter operate them under the terms and conditions provided in the section, plus further just terms and conditions required by the proper authorities. By paragraph 2, all terms and conditions of a franchise are required to be set forth in a certificate to be issued; and in paragraph 4, the further terms and conditions are ordained to constitute a contract with the City to which the law applies.

5. Interborough also constructed spans of additional tracks on the Manhattan-owned lines, under the same Section of said law and under like franchises and ordained contract. These franchises and contracts were, by Condition XV of the Additional Track Certificate, expressly connected with the franchises and contracts contained in another certificate called Extensions Certificate.

6. Paragraph 3 of said Sec. 24 ordains: that should an extension of an existing line of a company or an addi-

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NOTE—The Appendices are in a separate volume herewith. They are necessary, petitioner believes, for appraisal of his grievance.

tional track thereon be constructed, such would be constructed,

> "with like effect as though the same had been a part of the original route of its railroad then in actual operation * * *"

7. The conditions upon which Interborough was authorized to build said extensions and to operate its extended routes included:

> 1. that it would devote the gross revenues of the extended routes to paying (a) all taxes in respect to same, and (b) to paying all compensation payable for the use of Manhattan's properties, the parts of the City-owned lines and the spans of additional tracks; and
>
> 2. that it would devote the remainder of said revenues to (c) paying all other costs of operating said routes and, (d) only thereafter take or use any part of said remainder for any other purpose.

The above paraphrased provisions are contained in Condition XII of the "Extensions Certificate".

8. The certificate containing the franchises and contract to build and operate additional tracks, differed in two respects from that to build and operate the extensions,—viz., (a), it was tendered to Manhattan, but, (b), its condition numbered XIV provided for transfer thereof to Interborough, and for freeing Manhattan from the obligations thereof. Its Condition XV provided, expressly, that it would be issued in view of and in conjunction with the Extension Certificate, which was to be issued to Interborough.

9. On March 19, 1913 the Extensions Certificate was issued to Interborough and the highest Court of the State has held that:

> "On the same day an instrument known as the additional track certificate was issued to the Inter-

borough", *City of N. Y.* v. *I. R. T. Co.* (257 N. Y. 20 at p. 30) hereinafter called *Fare case*.

10. Interborough's routes, on August 26, 1932, consisted, on the one hand, of the routes created by unifying lines leased from Manhattan with parts of City owned lines (routes hereinafter called Company Routes), and, on the other hand, routes created by unifying lines leased from the City under three leases known as Contracts Nos. 1, 2 and 3 (hereinafter called City Routes).

11. Throughout the receivership the gross revenues of the Company Routes were sufficient to pay all the items mentioned in part "1" but not all the items referred to in part "2" of the paraphrased conditions, set forth in averment 7, above. The latter include payments on account of Interborough bonds and 7% notes.

12. The aforesaid Bill of Complaint, on which the receivership was commenced, showed that $31,672,100 of Interborough 7% notes would mature on September 1, 1932; $10,500,000 of its 6% notes would mature a month later; and that the Company had not provided to pay them. The 7% notes were collateralized by $54,989,000 Interborough bonds. Interborough also had outstanding $129,930,000 of bonds.

13. These bonds had been sold under a contract to pay interest on them and all bonds ever issued under the indenture, and to amortize them by devoting Interborough's income after compliance with its franchise obligations under the certificates for the extensions and additional tracks and under its contracts with The City, to paying 5% of the face value of the bonds in half yearly interest and 1% yearly in half yearly, amortization installments, on January 1, 1933, and periodically thereafter.

14. Other maturing obligations were installments of

Manhattan rentals and the other items payable under Condition XII of the Extension Certificate (see averment 7, 1(b) above), and rental installments payable to the City under Contracts 1, 2 and 3.

15. Among the maturing installments of Manhattan rentals were half yearly interest payable October 1, 1932 on Manhattan 4% Consolidated mortgage bonds, half yearly interest payable December 1, 1932 on Manhattan 4% Second Mortgage bonds and taxes due on Manhattan franchises and properties.

16. All of the Manhattan rentals actually and necessarily payable after 1922, except a yearly total of $304,570, in respect to its 43,510 shares of Guaranteed Stock, were items to be defrayed for its account and benefit, to prevent acceleration of the two Manhattan mortgages due, respectively, in 1990 and 2013.

(c) Receivership History to July 24, 1939.

17. The Interborough Equity Receivership and the management of the estate of said company and the management of Manhattan Company's affairs while in the Court's custody, should be viewed and appraised in the light of the foregoing facts.

18. The Interborough receivership commenced August 26, 1932, was extended to Manhattan on September 6, 1932, on petition of the latter company because the Interborough Receivers (Murray and Dowling) were operating the Manhattan-owned lines as parts of the said Company Routes, and the rentals were Manhattan's sole income and means by which its obligations could be met.

19. The ancillary receivership placed the Court in position, not only to protect Manhattan's standing as an Interborough operating creditor but also to protect its solvency by means of the undisaffirmed lease so long as

the funds designated to pay the rentals thereunder were available. (See averments 7 and 11.)

20. On August 26, 1932, *the declared and publicly known policy of the City and the Transit Commission* of the State of New York *was to require Interborough to operate its Company Routes and furnish through train service and transportation over same for a single 5¢ fare, as well as over its City Routes, pursuant to the Company's 1913 franchises and contracts.* Said policy and Manhattan Receiver Roberts' allegations shown in averment 22, *infra*, obviously are in accord with each other. See *Gilchrist* v. *I. R. T. Co.* (279 U. S. 159) and *City of N. Y.* v. *I. R. T. Co., supra.*

21. *Ex-Judge Manton, sitting as a District Judge, adopted the policy and recommendation of the Interborough Receivers* (afterward formally advocated in their Application No. 17), *of paying, as interim payments, commencing January 1, 1933, the half-yearly interest and amortization installments in respect to Interborough bonds, in preference to paying maturing Manhattan rental installments.* The Order dated December 21, 1932, as amended by Order dated December 29, 1932, illustrates the orders for such interim payments in respect to Interborough bonds, including the January 1939 payment. The Court has never issued the decree for recapture of the interim payments which, by the reservations in said orders, it promised to issue if no right to disaffirm the Manhattan lease existed.

22. *On March 14, 1933, the Interborough Receivers asserted* (in Application 17, *supra*), *"the absolute legal right to disaffirm the Manhattan lease"* despite it being obvious that, if they did, they would stop operating parts of the Company Routes; despite their knowledge that under the State's laws they needed the Transit Commission's permission to do so and could not get it; and *despite the provisions of §65 of the Judicial Code* (see

note below). *And they asked "that the right of Interborough Receivers to affirm or disaffirm the lease shall continue until the further order of the Court" and stated they did not intend "to obtain from the Court at this time any determination of the existence of such right."*

23. On March 31, 1933, Manhattan Receiver Roberts, in his Application No. 5 (exhibited as Appendix C, App. 19 herewith), challenged the recommendations, assertions and intentions shown in Interborough Receivers' Application No. 17. *He alleged that, contrariwise, the lease could not be disaffirmed because Interborough was bound by franchises and connected contracts to operate the Manhattan lines; and that Manhattan rentals were items of operating costs, payable before any payment on account of Interborough bonds.* He, thereupon, asked the Court to issue a decree declaring that the Interborough Receivers had no authority to disaffirm the lease; directing them to forthwith pay the interest due next day on Manhattan's senior mortgage bonds and Guaranteed Stock, and the past due items of Manhattan rentals; and directing them to provide said rentals as they became due thereafter, before paying any interest or sinking fund requirement of Interborough's mortgage (App. 38).

24. Victor J. Dowling and Thomas E. Murray were appointed Interborough Receivers by ex-Judge Manton who also appointed Chadbourne, Stanchfield and Levy counsel for them, and when the latter resigned, appointed Hornblower, Miller, Miller and Boston, afterward known as Miller, Owen, Otis, and Bailey, successor counsel. Ex-Judge Manton, October 2, 1933, surrendered charge of the receivership after the opinion of this Court in the suit of *Johnson* v. *Manhattan Railway Company and others* (289

U. S. J. C. §65, requires that any property in a federal receivership shall be managed and operated "according to the requirements of the valid laws of the state in which such property shall be situated in the same manner that the owner or possessor thereof would be bound to do if in possession thereof * * *".

U. S. 472), had been rendered. Judge Mack succeeded Manton on October 2, 1933, pursuant to designation by the Chief Justice of the United States.

25. On February 1, 1934, the Interborough Receivers applied for leave to disaffirm the Manhattan lease because Judge Mack directed them to state whether they wanted to or not.

26. Receiver Dowling died March 24, 1934 and Receiver Murray has carried on alone.

27. When the Interborough Receivers asked leave to disaffirm the Manhattan lease, the City and the Commission, severally, asked the District Court to permit them to obtain a declaratory judgment in the State Courts, declaring the Interborough Receivers could not stop furnishing the existing service over the Company Routes. American Brake Shoe & Foundry Co. v. I.R.T. Co. (10 Fed. Supp. 512)

28. On January 10, 1935, Judge Mack decided to refuse said permission and instead to make the City and the Commission parties in the receivership proceedings despite their common wish to stay out (10 Fed. Sup. p. 512). In his opinion the Court, in effect, stated (pp. 514-15) obviously, no decision as to disaffirmance of the Manhattan lease would be proper without a determination of the effect thereof on the rights of the City, because the effect might be controlling as to affirmance or disaffirmance of said lease.

29. Judge Mack stated two reasons for his decision and action on January 10, 1935. One (pp. 522-23) was, that determination of whether the lease could be disaffirmed had already been too long delayed and was making the administration of the receivership increasingly difficult, particularly, in respect to the interim disbursements. The other (p. 523) was, that he feared there might be duplication in the State Courts of the time already consumed in "educating" the District Court.

30. Notwithstanding said January 10, 1935 decision, consideration of the effect of disaffirmance on the City's rights was put off until November 1937, or 4 years and 7 months after Receiver Roberts' Application No. 5 was submitted and 2 years and 10 months after the decision. Consideration thereof commenced after Receiver Murray asked, on October 25, 1937, for leave to disaffirm (a) the Extensions Certificate; (b) the Joint Trackage Agreement (connected with both Contract No. 3 and said franchises); and (c) a three-party contract (Manhattan, Interborough and the City), ancillary to an agreement of 1903 between Interborough and the City, amending Contract No. 1, under which certain Company Routes were established. See Findings, Appendix B.

31. These Routes consisted of the City-owned Westchester Avenue line in The Bronx, and part of the Manhattan owned 3rd Avenue line in The Bronx and the Manhattan-owned 2nd and 3rd Avenue lines in Manhattan which, like The Bronx, is a part of the City. Finding 2, Appendix B.

32. Judge Mack surrendered administration of the receivership, and conduct of the hearings before arguments on said four Applications. January 28, 1938, Judge Patterson took charge and conducted the receivership affairs until he resigned from the bench in the summer of 1940.

33. In his opinion as to disaffirmance of the Manhattan lease, June 16, 1938, Judge Patterson opined: that if Interborough were tied to the Manhattan owned lines by any other instrument in addition to the Manhattan lease, the rental payments payable to Manhattan bondholders and holders of Manhattan Guaranteed stock must or would be payable ahead of any payment on account of Interborough bonds. The Opinion is not reported. The Order is the subject of Mandate, Appendix B.

34. Judge Patterson did not pass upon the provision in Section 24, paragraph 3, of the Rapid Transit Act though

he was asked to do so. These seem to specify that Interborough constructed each extension of its leased lines "with like effect as though the same had been a part of the original route of * * * its railroad then in actual operation * * *."

35. This Court has decided that the laws of the place at the time of making an agreement, enter into and form part thereof as if expressly incorporated therein. *Edwards* v. *Kearsey* (96 U. S. 505 at 601).

36. Judge Patterson held that Interborough was not tied to the Manhattan-owned lines by any other instrument besides the lease, and that Interborough Receivers were free to disaffirm the lease. In the same ~~opinion~~ decision he held that Receiver Murray must keep and operate several fractional Company Routes, consisting, respectively, of an extension of a Manhattan-owned line built by Interborough under the Extension Certificate and a part of a City-owned line. See Appendix B. Findings 2 and 3.

37. No application was ever made to disaffirm the franchises for the spans of additional tracks on Manhattan-owned lines. See Appendix B.

38. In *Murray* v. *Roberts* (103 F. 2d 889), the Circuit Court said:

> "The District Court, having decided that the Interborough's covenant was only to operate trains over the 'Extensions' and the joint tracks, held it was therefore free to reject the Manhattan lease, since it needed no other franchises to perform its contract than those given by the 'Extensions Certificate' and the 'Joint Trackage Agreement'. With this we do not agree * * *. * * * we conclude that Interborough is bound * * * to operate trains over the 'Extensions' and the joint tracks, and that in order to do so it must keep those franchises. And we hold that to those franchises the 'Third Track Certificate' is indissolubly united so that it must keep that also" (pp. 393 and 4).

In conclusion the Circuit Court said:

> "It is impossible definitely to settle the terms of the order now, but the receiver's instructions should in general be as follows. He must continue to keep possession of all tracks which are authorized under the 'Third Track Certificate' and he must exploit them sufficiently to protect the certificate against forfeiture for non-feasance. He must operate through trains over the 'Extensions' and the joint tracks, and this will almost certainly make it desirable to continue them over the third tracks as well * * *. He must accept northbound passengers free upon the 'West Farms Extensions' whatever their destination (except so far as by agreement transfers are substituted). As possessor of the Manhattan third tracks on Third Avenue he must similarly accept southbound passengers free. He will reject the Manhattan lease if he is able to perform the foregoing obligations to the City by any other means than affirmance of it; but if after negotiations with the Manhattan and with the City no other means is possible than affirmance of the lease, he must affirm the lease.
>
> "The order is modified in accordance with the foregoing."

39. Immediately after the entry of the Circuit Court's decision on April 17, 1939, the daily papers commenced to carry items regarding conferences between persons representing The City and the Morgan, Case and Merle-Smith committees, in respect to acquisition by The City of the outstanding securities of the Manhattan and Interborough companies.

40. On July 24, 1939, the Circuit Court issued the Mandate in *Murray* v. *Roberts* in the light of its holding that Receiver Murray must keep the Extensions and Additional Track (Third Track) Certificate and the Manhattan lease, unless he obtained a substitute for it by "negotiations with Manhattan and The City."

41. Mr. Murray never entered into such negotiations.

(d) History of the Plan and Agreement.

42. On July 26, 1939, the Transit Commission presented to Judge Patterson, in open court, a copy of the instant Plan and Agreement. It was then practically in the terms adopted by the Commission on August 29 and by The City on August 31, 1939.

43. On July 27, 1939, Judge Patterson ordered Receiver Murray to obey the Circuit Court's Mandate, mentioned in averment 40. (See Appendix B, App. 8 and 16.)

44. On July 28, 1939, Judge Patterson postponed holding the proceedings required by the Mandate, for an indefinite period. He stated, specifically, he did so in the expectation that the City would consummate its proposed acquisition of the Manhattan and Interborough securities under the proposed Plan and Agreement. He then left to take a vacation.

45. Transit Commission held statutory hearings on the Plan and Agreement (hereinafter called Plan), early in August 1939.

46. The Plan was changed by the Transit Commission by eliminating parties invited to join in it, but who objected thereto, among them Harold Palmer *et al.*, the committee who had bespoken the interests of the owners of Manhattan Guaranteed Stock throughout the receivership. Among the changes in the Plan were the following:

A. Two provisions in Article Seven, Section II calling for assent, respectively, by the holders of two-thirds of the 43,510 shares of Manhattan's guaranteed stock and the holders of the 556,490 shares of its modified guarantee stock were deleted; and same were substituted by a provision calling for assent by holders of two-thirds of the total 600,000 shares of Manhattan stock as the requisite assent by Manhattan stockholders, required to bind the Transit Commission to declaring the scheme operative;

B. A committee headed by Theodore S. Watson, pledged to approve and recommend the scheme to the holders of Manhattan Guaranteed 7% Stock, was substituted for said Palmer Committee;

C. A provision was added to Article Three, allowing objectors before the Transit Commission to assent later and thereby become eligible for participation in the emoluments to be awarded to committees and others, for having obtained assents to the scheme and/or for whatever they did in the receivership, whether or not beneficial to the insolvent Interborough Receivership Estate or to the solvent Manhattan Railway Company.

47. The scheme was adopted by the Transit Commission on August 29, 1939, and transmitted for statutory hearing by the City's Board of Estimate on August 31, 1939, and the pre-arranged adoption by the City on that day.

48. *The Transit Commission* is a State administrative body and, *under State laws, has sole jurisdiction of the Plan.*

49. On September 27, 1939, Judge Patterson signed an order approving an action by Merle-Smith *et al.*, on behalf of Manhattan Consolidated Mortgage bondholders, accelerating the debt and directing the mortgage trustee to present the necessary papers, with reservation by the Court of all questions as to the provisions of the Decree of Foreclosure and Sale.

50. *The petition of the Merle-Smith Committee and Judge Patterson's order,* September 27, 1939, *are based on and intended to be in aid of the Plan,* a copy of which is annexed to and filed with the petition, in the District Court.

51. *On November 13, 1939, an order was signed,* in respect to the foreclosure, *providing that the averments*

of the complaint therein be deemed denied or avoided pursuant to Rule 8(a) of the Rules of Civil Procedure.

52. *The District Court had no equitable right or authority to entertain the foreclosure action in view of the decision in Murray* v. *Roberts,* above, *that the Manhattan lease could not be disaffirmed of a right.*

53. On November 22, 1939, the Transit Commission ordered the Plan, for acquisition of the securities by The City, operative, pursuant to the State law, the terms of the Plan and the authority vested in it by law.

54. *The Plan needed no approval or enforcement by any court, in so far as its lawful provisions are concerned.*

55. Upon the Plan becoming a contract, by reason of the Transit Commission's order, The City acquired,

$33,867,000	or	87.27%	of	Manhattan Consolidated Mortgage bonds
3,402,000	"	72.22 "	"	Manhattan Second Mortgage bonds
40,675,000	"	66.77 "	"	Manhattan stock, or 400,675 shares
74,513,000	"	76.66 "	"	Interborough First Mortgage bonds
25,546,400	"	80.65 "	"	Interborough 7% notes

deposited with the agents selected by The City and the Merle-Smith Committee, the Morgan Committee for the Interborough bondholders, and the Case Committee for the Interborough 7% noteholder.

56. *The City was represented in the receivership proceedings by the Merle-Smith, Morgan, Case and Watson committees and the firm of Curtis, Belknap and Webb, after November 22, 1939, besides the Corporation Counsel and the Transit Commission in regard to the above five kinds of securities.*

57. On November 27, 1939, a hearing was had in respect to the Manhattan Consolidated Mortgage foreclosure action. Counsel for Harold Palmer *et al.*, in the interests of the Manhattan Guaranteed Stockholders, asked that the Manhattan foreclosure action be consolidated with the Morgan Committee's pending action to have Guaranty Trust Co., Trustee, accelerate and foreclose the Interborough mortgage, that the defaults be cured and the Manhattan foreclosure action dismissed. He said:

> "We therefore are asking that the Interborough receiver pay from funds in his hands sufficient to make good those defaults, that sufficient moneys be recaptured from the $79,000,000 which Interborough receiver has erroneously paid for the benefit of the first mortgage bondholders of the Interborough, to make good those defaults, and that can be done by consolidation of both actions."

58. The Palmer Committee tried to intervene in the Interborough Mortgage foreclosure action, and the District Court denied them intervention, whereupon they appealed.

59. The Circuit Court of Appeals, informed by the Record on Appeal and briefs that Judge Patterson had held the Plan fair and feasible on March 15, nevertheless, on April 15, 1940, decided that the rights of owners of Manhattan Guaranteed Stock in respect to the Interborough Estate could not be and were not foreclosed or cut off by the Final Decree of Foreclosure and Sale under the Interborough mortgage. *Palmer* v. *Guaranty Trust Co.* (111 F. 2d 115).

60. *No conditions contained in the order confirming the sale on March 11, 1940 under said Final Decree can actually foreclose or cut off the said rights of the owners of Manhattan Guaranteed Stock under 111 F. 2d 115.*

61. The parties mentioned in averment 56 (except the

City and the Transit Commission), and other parties also representing securities already acquired by the City, entered into an alleged compromise of the claims of Manhattan and its securities holders at $13,500,000. But the City asked the Court to increase the amount to $18,000,000, to serve as a cash settlement fund for owners of Manhattan securities who would not accept the City's offers for their securities in terms of City bonds. The Court so ordered.

62. *None of the parties to the alleged compromise represented any interest of any owner opposed to any other owner, and all the interests represented by said parties had already merged in the City's ownership thereof.*

63. *The proceedings in the District Court in respect to the Plan were had without any opposition having been made to the acquisition of the securities tendered to The City, by The City, as authorized by the laws of the State. No such action has ever been instituted.*

(e) i, My Appeal, 122 F. 2d 454.

64. Pursuant to published notice, on February 23, 1940, I objected to the Plan as an instrument to end the receivership improperly. In such respect I alleged, among other things, that the Plan is unfair:

(i) "Because it is intended to effect a final distribution of the assets of the Interborough estate which have not been distributed heretofore, without adjudication of the legality of the prior distributions.

(ii) Because, under the law of the receivership cause, a determination of the fundamental question whether the Court has power to disaffirm the Manhattan lease is a necessary condition precedent to a determination of the rights and priorities of the various security holders of the two companies, and the Plan seeks to render ineffectual the law of the case.

(iii) Because the franchises of the Extension Certificate and the law of the State of New York make mandatory the retaining of the Manhattan lease by Interborough and its Receiver and the performance of all the obligations of said franchises by Interborough and its Receiver.

(iv) Because Interborough bondholders are co-adventurers with Interborough Company in respect to the performance of the obligations under the franchises of the Extensions which obligate Interborough to retain the Manhattan lease and said bondholders are not entitled to receive any payments of any kind until the obligations of the franchises and the lease have been fully performed.

(v) Because the Plan is designed to dispense with and avoid a fair and just consideration and adjudication of the rights and priorities of all security holders and to impose in place of such consideration and adjudication, an illegal and arbitrary fixing of rights and priorities wholly contrary to law.

(vi) The foreclosure of the Manhattan Consolidated Mortgage is null and void and must be vacated, and, therefore, the Merle-Smith Committee is in no position to make any conveyance of the Manhattan property.

In (ii) I referred to *Murray* v. *Roberts*, 103 F. (2d) 889.

65. These objections appear in the Record on Appeal in 122 F. (2d) 454 on pages 331 to 333 of said Record.

66. The Record on Appeal in the *Palmer* v. *Guaranty Trust Co.* cause (*supra*), contains the following excerpt of discussion in the District Court on pages 100 and 101 of the Record. It substantiates above averments 57, 58, 59 and 60.

"The Court: Do you mean the receiver of the Interborough, or the Manhattan Receiver?

Mr. Sunderland: The receiver of the Interborough. But I think that the party, the representative party,

is the American Brake Shoe and Foundry Company, who have sued in behalf of all creditors.

Mr. Bowers: We do not claim to be a general creditor, your Honor. We claim to be an operating creditor, which is quite different from the plaintiff.

Mr. Sunderland: To that extent the receiver represents the operations, and the creditors, since his appointment.

Mr. Bowers: Well, the receiver has taken an adverse attitude toward our claim and does not adequately represent us.

The Court: The receiver of the Manhattan does.

Mr. Bowers: Yes, the receiver of the Manhattan actually represents——

The Court: Not an opposite view.

Mr. Bowers: No, I think not the receiver of the Manhattan; but he represents conflicting interests, because our interests and those of the modified guaranteed stock are not the same.

The Court: He does not represent any conflicting interests so far as the foreclosure of the Interborough 5% mortgage is concerned?

Mr. Bowers: So far as our rights are concerned he does not represent our rights at all.

The Court: He does not represent any opinion in opposition to you, on any issue presented by this bill of foreclosure that I can think of.

Mr. Bowers: He may not be adverse to us, but he certainly is under no duty to protect our interests. We are in direct contract relationship. Not through the Manhattan receiver, but directly, in our own right.

The Court: Does anyone else want to be heard?

Mr. Franklin: Your Honor, on behalf of the Manhattan Railway Company, which is named in the foreclosure bill, we have no objection. And that also applies to the committee for the modified stock of the Manhattan Company.

Mr. Bowers: Might I point out to your Honor that it is not necessary to determine the validity of our claim in any way in this application. * * *"

Mr. Sunderland is the Counsel for the Morgan Committee and the Guaranty Trust Company, Trustee, of the

Interborough mortgage. Mr. Bowers appeared for the Palmer Committee for Manhattan Guaranteed Stock.

67. In 122 F. (2d) 454, the Circuit Court said:

> "The scope of Manheim's appeal is restricted to those provisions of the court's orders which limit him as a non-assenting bondholder to the recovery of $394.68 per thousand dollar bond. He asserts no wish to upset the transfer of the properties to the City or to change the participation of assenting security holders * * *."

68. My appeal is very different (see averments 64 and 65 above), and my argument was equally different. I pointed out that the contract made by The City of New York with J. P. Morgan *et al.*, J. Herbert Case *et al.*, and Van S. Merle-Smith *et al.*, which the contracting parties labeled Plan and Agreement, constituted a scheme for ending the Interborough and ancillary Manhattan receiverships without having the District Court fulfill its duties as the Receivership Court, by reason of its orders of March 15 and June 12, 1940.

69. Therefore, on pages 2 and 3 of my main brief in 122 F. (2d) 454, I presented the matter as follows:

> "* * * Said orders, unless corrected, would serve to rid the Court of its unfulfilled duties including the duty of settling and determining the impropriety of interim payment totaling over $70,000,000. The scheme was devised by the City and the three committees.
>
> "Among the orders filed on June 12, 1940, one confirmed a prior foreclosure sale of Manhattan Railway Company's belongings; another confirmed a prior foreclosure sale of said Interborough Company's belongings; and a third ordered consummation of the Plan and Agreement. This appeal includes appeal from the order approving extinguishment of claims and fixing a 'Settlement Fund', and from any order connected with the foreclosure sales of Interborough Company's belongings, in so far as same might confer

any rank or standing on holders of Interborough's bonds and 7% notes, ahead of or equal to that which, lawfully and equitably, belonged and belongs to Manhattan Company, as an Interborough creditor. The scope of this appeal is not limited in any other respect than that indicated in regard to the foreclosure sales of Interborough's belongings and necessarily includes appeal from the improper administering of the Receivership Estate which led up to this scheme to dispose of said remainders of said estate and the belongings of Manhattan Company, in alleged protective custody, in the manner set forth in the Plan and Agreement."

and concluded the brief as follows:

"WHEREFORE, Appellant prays that this Court (a) declare the Plan and Agreement unfair as a matter of law; (b) unfair because of allowing foreclosure of the Manhattan senior mortgage on the basis of the Court's errors and without amends to Manhattan Company, Appellant and others; (c) that it was error on the part of the District Court to approve the Plan and Agreement and assist in the consummation thereof; (d) command the District Court to declare that the Manhattan lease was necessarily adopted by Interborough Receivers when they were appointed on August 26, 1932; (e) to grant such further relief as is just, lawful, and feasible in the premises; and (f) command the District Court to have, forthwith, such proceedings as should be had in the matter according to law, justice and the laws of the United States.

Dated: April 15, 1941.

SOLOMON G. SALOMON,
Appellant pro se."

70. In my brief of April 15, 1941 I stated the matters herein set forth in averments 2 to 10 inclusive, under the same heading, *i. e.*, Fundamental Facts. Then, under the heading Receivership History, I said:

"Judge Patterson did not hold that the language of Section 24, paragraph 3 of the Rapid Transit Act, hereinbefore quoted under FUNDAMENTAL FACTS, is

obscure or that, because of context, any other meaning can be given to said language than that Interborough was bound to operate such spans on a Manhattan-owned line and the original line as a unit. Neither has this Court so held."

71. In my Reply Brief (which pursuant to stipulation with Respondents approved by the Circuit Court was filed after the argument for the reason that the Respondents were granted extra time to file their Answering Brief), I said:

"Out of super-abundance of caution, I submit, that I am not bound by Manheim's brief or his reply brief and that the Respondents do not answer my brief by fencing with Manheim, for the following reasons:

1. Manheim does not base his claim upon the fact that he is a creditor of a solvent company, which is being dissolved; does not attack the propriety of treating Manhattan as an insolvent; but contends he is entitled to payment in full in respect to his bonds before any distribution is permissible to the owners of Manhattan Stock.

2. I do not subscribe to his theory that the insolvent Interborough Company would be allowed by the District Court to buy in any of its securities to the harm of any of its creditors according to their respective ranks.

Out of further super-abundance of caution, I hereby make it known to this Court that I asked the Merle-Smith Committee and the 'Distributing Agent' under the 'Plan' to pay to me the amount set aside in the 'Settlement Fund' in respect to my Manhattan securities, but without surrender by me of any of my right to collect the amounts properly payable to me in respect to the securities then held. They refused to pay me the said amounts unless I received same in full settlement of all my claims in respect to Manhattan Company's belongings.

Despite verbal explanation to Mr. James, of counsel to the Merle-Smith Committee, informing him that I needed said amounts because credits granted me and based on said securities were being withdrawn, the said refusal was continued. Therefore $46,000 of

Manhattan Consolidated Mortgage Bonds and 50 shares of the Guaranteed 7% Stock were sold at prevalent market prices to cover my necessities."

(e) ii, The Circuit Court's Refusal to Decide My Points.

72. In connection with above averments 64, 67, 68, 69, 70 and 71 the Circuit Court said:

> "* * * certainly we shall not, in any event decide the merits of such claims as this appellant appears to desire." (122 F. 2d 454 in last paragraph of the decision.)

73. I petitioned for a rehearing saying, among other things that:

> "Others may sell or otherwise dispose of their rights—but they may not properly dispose of Manhattan Company's rights or force petitioner or others similarly situated to enter into their agreement."

74. The City admitted in its brief and argument before the Circuit Court of Appeals that the Plan was for The City to acquire the securities of the Manhattan and Interborough companies (Appendix D, App. 43, 44). Besides, the Circuit Court had cognizance of the fact, for it said, "On January 1, 1939 the Fertig Amendment to the State Constitution became operative * * *. It authorized the City to issue securities outside of its debt limit for the purpose of acquiring transit securities * * *" (122 F. 2d 454 at 456).

75. By refusing the rehearing (averment 73 above), *the Circuit Court refused to adjudicate*:

> 1. *Whether the District Court has authority to compel me to sell my alleged rights*, as owner of my Manhattan Guaranteed Stock, *to The City of New York*, for one of the two offers it made me to acquire my stock.

2. *Whether the District Court had had ample time,* before relinquishing possession of the Interborough and Manhattan properties to The City, *to adjudicate my rights and priorities as against the Interborough bondholders, in the light of no right to disaffirm the Manhattan Lease, as commanded in Murray* v. *Roberts and pursuant to its duties as Equity Receivership Court.*

3. *Whether the District Court has authority to penalize me* for not accepting either of said two offers, *by enjoining me against pursuing my unadjudicated rights, in any court,* against the City or any other party to the Equity receivership proceedings.

76. The Circuit Court of Appeals considered and analyzed Manheim's appeal at length, in 122 F. 2d 454, commencing with the statement that:

> "*The scope of Manheim's appeal is restricted to those provisions of the court's orders which limit him* as a non-assenting bondholder *to the recovery of $394.68 per thousand dollar bond. He asserts no wish to upset the transfer of the properties to the City* or to change the participation of assenting security holders, but he asks for an order directing that the bonds he owns or represents be paid in full, *or,* in the alternative, that a new hearing be granted to determine what amount in excess of $394.68 he is entitled to receive, or at least that he be given an amount equal to what he would have received had he assented to the Plan. The burden of his argument is that no proceedings were had which validly determined the cash distributive shares to which holders of Manhattan Second Mortgage bonds were legally entitled; that the foreclosure sale and the judicial determination of the settlement fund upon which the respondents rely to support the valuation of $394.68 per bond, were merely devises used to coerce a reluctant minority into acceptance of the Plan; and that in fact his bonds were entitled to be paid in full."

77. *By analyzing only Manheim's limited appeal,* the which needed no adjudication and decision as to, (i), the correctness of the interim distributions on account of

Interborough bonds and 7% notes, (ii), power to disaffirm the Manhattan Lease, (iii), whether the Extension Certificate made mandatory the retention of the Manhattan Lease, (iv), reaffirming that holders of Interborough bonds are co-adventurers with Interborough and chargeable with the initial conditions of the Extension Certificate, as stated in *Murray* v. *Roberts, supra,* (v), whether the Plan was designed, or operated to dispense with a fair consideration and just adjudication of the rights and priorities of all holders of securities interested in the Interborough Receivership, and, (vi), whether the foreclosure of the Manhattan Mortgage is, in fact, invalid, and must be vacated and, therefore, the Merle-Smith Committee was not in position to make any conveyance of Manhattan property, (see averment 64 above), *and by saying, "Certainly we shall not, in any event decide the merits of such claims as this appellant appears to desire",* (see averment 72 above), *the Circuit Court refused to decide the questions raised by my appeal.*

78. *The Circuit Court has refused and failed* on three occasions previous to this, *to consider and adjudicate, in precise terms, whether the proposition that Interborough Receivers,* (and, before the receivership, Interborough), *were bound by Section 24 paragraph 3 of the Rapid Transit Act to operate the routes created under the Extension Certificate,* each consisting of a respective Manhattan-owned line plus an extension thereof, plus a part of a City-owned line *and, therefore, could not cease from operating any respective part owned by Manhattan, because the existence of the Manhattan Lease constitutes a condition precedent and necessary to the fulfillment of the conditions imposed by the Extension Certificate and the Rapid Transit Act.*

The proposition was first presented by your petitioner in the "partial foreclosure" action of the Manhattan Consolidated Mortgage, 99 F. 2d 789, as evidenced by what the Circuit Court said at page 793.

The proposition was again presented, but by the Transit Commission, in *Murray* v. *Roberts*. In the Commission's brief, among the statement of facts, it is stated that:

> "By the provisions of Section 24, subdivision 3 of the Rapid Transit Act as amended in 1912, the extensions authorized by the Elevated Extension Certificate *became a part of the old elevated lines 'with like effect as though the same had been a part of the original route of his or its railroad then in actual operation or in process of construction.* * * *'
>
> "The Interborough contemporaneously, by a separate contract dated March 15, 1913, assumed all the obligations of Manhattan Company under the Third-Track Certificate" (p. 10 of the Brief). (Italics in original.)

Under Point I of the brief, at page 20, the Commission argued that:

> "Under the language of Section 24, subdivision 3 of the Rapid Transit Act as amended in 1912, the extensions therein authorized after construction became a part of the original railroad."

Under Point II of the brief at page 32, the Commission, referring to the *Fare case, supra,* argued that:

> "The 'Third-Track Certificate' referred to above as issued to the Manhattan Railway Company was also issued to the Interborough, since it defined 'Manhattan Company' to include its lessee, which was Interborough. It provided that if the Elevated Extension Certificate issued to the Interborough or Contract No. 3 made with the Interborough should not take effect, or not be operative, the certificate should be void. And the Interborough had by formal contract with Manhattan Railway Company, dated March 15, 1913, assumed and agreed to perform this 'Third-Track Certificate' and to perform all obligations to the City in connection with it. The Court of Appeals in that action held that this Third-Track Certificate was in substance and effect issued to the Interborough. Its opinion reads, 257 N. Y. 30:
>
> 'On the same day * * * the additional track cer-

> tificate was also issued to the *Interborough.*" (Italics in original.)

Under its Conclusion of the brief, on page 67, the Commission argued that:

> "The order appealed from insofar as it authorizes Interborough Receiver to surrender the Manhattan property and insofar as it denies the petition of the City, acting by the Transit Commission, to enforce specific performance of the 1913 contract should be reversed."

The proposition was presented the third time in your petitioner's appeal, 122 F. 2d, 454. In his brief on the appeal, among the statement of facts, he said on pages 12, 13, 14 and 20 that:

> "Before 1913, all Interborough's rapid transit railroads were leased lines, belonging to the City and Manhattan. After March 19, 1913, Interborough extended some of the latter lines, under an agreement with the City, wherein the company undertook to connect them with and to operate them in conjunction with parts of City-owned lines. In order to fulfill said agreement, Interborough applied to the Public Service Commission under Section 24 of the Rapid Transit Act of the State of New York, (L. 1891, c, 4 as amended), for the enabling franchises (Appendix A).
>
> "In paragraph 1 said Section provides, generally, that a lessee of lines, actually operating them, may be granted franchises to extend its said lines on condition that it thereafter operate them under the terms and conditions provided in the section, plus further just terms and conditions required by the proper authorities. By paragraph 2, all terms and conditions of a franchise are required to be set forth in a certificate to be issued as evidence of the grant, and in paragraph 4, such terms and conditions are ordained to constitute a contract with the City to which the law applies.
>
> "Interborough also constructed spans of additional tracks on the Manhattan-owned lines, under the same Section of said law and under like franchises and ordained contract. These franchises and contracts

were, by Condition XV of the Additional Track Certificates, expressly connected with the franchises and contracts contained in the 'Extensions Certificate'.

"Paragraph 3 of said Section 24 ordains that, should an extension of an existing line of a company or an additional track thereon be constructed, such would be constructed,

> 'with like effect as though the same had been a part of the original route of * * * its railroad then in actual operation * * *'."

* * *

"The certificate containing the franchises and contract to build and operate 'additional tracks', differed in two respects from that to build and operate the 'extensions',—viz., (a), it was tendered to Manhattan, but, (b), its condition numbered XIV provided for transferring it to Interborough, and for freeing Manhattan from the obligations thereof. Its Condition XV provided expressly, that it would be issued in view of and in conjunction with the 'Extension Certificate', which was to be issued to Interborough, permitting Interborough to build and operate said extensions."

* * *

"On March 19, 1913 the 'Extensions Certificate' was issued to Interborough and the Court of Appeals has held that:

> 'On the same day an instrument known as the additional track certificate was issued to the Interborough', *City of New York* v. *I. R. T. Co.* (257 N. Y. 20 at p. 30) hereinafter called *Fare case*.

"Because of the foregoing, Interborough's routes, on August 26, 1932, consisted, on the one hand, of the units created by unifying lines leased from Manhattan with parts of City-owned lines, by means of said extensions, (units hereinafter called 'Company Routes'), and, on the other, units created by unifying lines leased from the City under three leases known as Contracts Nos. 1, 2 and 3 (hereinafter called 'City Routes')."

* * *

"The fact that the Court of Appeals had held

"* * * an instrument known as the additional track certificate was issued to Interborough' (*Fare case, supra*), apparently, was overlooked.

"No application was ever made to disaffirm the franchises for the spans of additional tracks on Manhattan-owned lines.

"Judge Patterson did not hold that the language of Section 24, paragraph 3 of the Rapid Transit Act, hereinbefore quoted under FUNDAMENTAL FACTS, is obscure or that, because of context, any other meaning can be given to said language than that Interborough was bound to operate such spans on a Manhattan-owned line and the original line as a unit. Neither has this Court so held."

On pages 28 to 33 inclusive he submitted that there were three FUNDAMENTAL FACTORS which need to be borne in mind to appraise the conduct of the affairs of the Equity Receivership correctly. Under sub headings *First Factor*, *Second Factor* and *Third Factor*, your petitioner said that:

"FIRST FACTOR: This is that the application by Interborough Receivers for time and Judge Manton's grant to them of time in which to make formal application to disaffirm the Manhattan lease, were wrongful acts.

"Obviously, where there are not sufficient funds to pay all obligations, any person attending to his own affairs would be expected to refrain from making payments which might prove to be illegal because other payments should have been defrayed first. It is not necessary to cite any law or decision to prove that, as trustees, the judge and his receivers were required to exercise the same care expected of anyone in charge of his own affairs.

"In their Application No. 17 and by the amounts set forth in the thereto attached Exhibit A, the Interborough Receivers showed they did not have sufficient funds to defray the Manhattan rentals, the cost of equipment which the Commission deemed necessary to accommodate the public properly, and installments payable in respect to Interborough bonds. The recommendations, assertions and inten-

tions shown in said application were formally challenged in Manhattan Receiver's Application No. 5 and, in fact, had been referred to a Special Master, pursuant to Judge Manton's memorandum of October 11, 1932 referred to in said Application No. 17.

"It, likewise, needs no citation of law to prove it is a fundamental principle, applicable in this Equity Receivership, that the Court and its receivers were in duty bound to use the income and other assets of the estate according to the sequence of the priorities of Interborough Company's creditors. Hence, Appellant submits, Judge Manton and the Interborough receivers committed a wrongful act in delaying determination of the legality of the act which they, obviously, were intending to do and it was error to allow said receivers to do it repeatedly, while the delay continued."

* * *

"SECOND FACTOR: * * *

"By reading the provisions of Section 24 into Interborough's franchises to extend its elevated railroad lines, it becomes apparent that this company undertook to operate each extended 'Company Route' as if the 'extended route' were the 'original route' and, consequently, as a matter of law, the Manhattan-owned lines are fractions of 'Company Routes' under Interborough's franchises.

> 'It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms'. *Edwards* v. *Kearzey* (96 U. S. 595, 601).

"It is elementary that the Interborough Receivers could not discard or reject a part of a route, and had no valid grounds for claiming the right (Application No. 17, *supra*), to disaffirm the Manhattan lease; that the Federal Court has had no valid reason to allow its receivers to disaffirm the lease under the existing circumstances; and the Court could not, lawfully, regard the lease as if same could be disaffirmed."

"THIRD FACTOR: This is that since, as a matter of

law, particularly because the State and the City insisted on fulfillment of the franchises' obligations, the Manhattan lease must be deemed adopted as of the date of the receivership; the Manhattan lease, so far as the receivers and the Federal Court are concerned, is equal to a lawful contract actually negotiated by the receivers; and, consequently, cannot be repudiated by them without the consent of every share of stock of the Manhattan Company, as provided in the lease."

Commencing his argument on pages 33 and 34, your petitioner argued:

"The Plan and Agreement in question, is a scheme whereby the belongings of the insolvent Interborough Company and the belongings of the solvent Manhattan Company were sold as one lot, to the City of New York. The City, as indicated in Article Eighth, Section VII thereof, chose to take title to Manhattan's belongings from the Merle-Smith Committee, on June 12, 1940, pursuant to Article Two (2) of the scheme. The pre-arranged foreclosure sale under the decree of December 11, 1939, was, accordingly, confirmed on June 12, 1940 and, in accordance with the scheme and as part of the one transaction, title was then vested in said committee and simultaneously transferred to the City.

"The said decree was based upon accumulated defaults in respect to the Manhattan senior mortgage bonds, but the defaults occurred and accumulated because of errors committed by the Court which issued the decree. Such process of law, Appellant submits, may not, under the Constitution, be employed to take any person's property or Manhattan Company's belongings. * * * Appellant submits, it was not just, or lawful under the Constitution, to allow this Plan and Agreement to be consummated without exacting that amends be made to Manhattan Company by the beneficiaries of the said errors and that the future value of the lease contract be provided for the holders of Manhattan Guaranteed Stock.

"Whether or not Judge Manton and his receivers purposely bungled the administration of the Interborough Estate in the Equity Receivership and, like-

wise, their trusteeship of the solvent Manhattan Company's affairs, does not alter the effect produced. The fact is that, as an elementary proposition of law, parts of the 'Company Routes' could not be discarded by the Interborough Receivers. * * * After dodging this elementary proposition for almost six years, the District Court came to the wrong conclusion as to said lease. * * * This Court, in its opinion of April 17, 1939, disagreed, and decided that Mr. Murray was not free to disaffirm the Manhattan lease. In the ensuing mandate, this Court commanded the District Court to instruct Mr. Murray to adopt the lease, if, by 'negotiations with the Manhattan and with the City', he did not obtain other means than the lease to fulfill Interborough's obligations to the City; and, also, commanded the District Court to have the further proper proceedings which should be had in the matter, 'according to right and justice, and the laws of the United States'.

"The District Court on July 27, 1939, adopted the decision of this Court, and instructed Mr. Murray, as aforesaid; but Mr. Murray did not negotiate nor adopt, as instructed, and the District Court did not have the further proper proceedings which should have been had in the matter, according to right, justice and the laws of the United States."

79. The Circuit Court refused to decide your petitioner's points set forth hereinabove in averments 72 to 78 inclusive.

(f) My Petition to the District Court to Perform Its Unperformed Duties as Receivership Court.

80. Inspection of the petition of June 26, 1942 and the amended petition of August 8, 1942, (Rec., fols. 29-41 inclusive) will show that all that is alleged in the first petition is, in effect, repeated in the second.

81. Referring to folio 34 of the Record, your petitioner calls attention to the fact that the third and fourth lines of said folio do not appear in the original amended petition.

82. Inspection of the petitions of June 26th and August 8th, 1942, evidence the fact that same merely constituted a petition to the District Court to perform its unperformed duties as Receivership Court in the Equity Receivership of the Interborough Rapid Transit Company and the ancillary Manhattan Receivership.

83. It is evident by Appendix E (App. 50 and 51) that briefs were submitted. And it is evident by the pleadings in the District Court, (Appendix F, App. 59 to 65 inclusive), that your petitioner pleaded the Court should comply with its duties according to *Palmer* v. *Guaranty Trust Co.* (111 F. 2d, 115), as well as *Murray* v. *Roberts, supra.*

84. *In said briefs your petitioner made it clear that his petition merely asked the District Court to perform its duties as Receivership Court.*

(g) The Chicanery of the City of New York, et al.

85. Appendices F, G and H (App. 52 to 82 inclusive) show that petitions of June 26th and August 8th, 1942 were not the only pleadings in connection with your petitioner's request to the District Court to perform its duties as Receivership Court.

86. The title of the case wherein your petitioner petitioned the District Court on June 26 and August 8, 1942, (Rec., fols. 29 to 33 and fols. 34 to 43), is *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company,* (Rec., fol. 1), an action in Equity Receivership.

87. The character of the petitions is stated at the outset in each, in identical language. It is to bring on proceedings in the Equity Receivership action which ought to be had because of the mandate in *Murray* v. *Roberts,*

(Appendix B, App. 8 to 15), see also allegations 46 to 54 inclusive, (Rec., fols. 40 and 41).

88. No denials of any of the allegations contained in the petitions that the District Court do its duty as Equity Receivership Court was made.

89. The City *et al.* pleaded, via Daniel James, that all the precise questions raised had been adjudicated, (Appendix F, App. 52 to 58), but this was denied and shown to be untrue by the affidavit in reply, (Appendix F, App. 59 to 65).

90. James' affidavit, (App. 59 to 65), is contradicted by the undenied allegations in said amended petition.

91. The Trustee of the Manhattan Consolidated Mortgage pleaded, via Orrin G. Judd, in answer to allegation 22 of the amended petition, (Rec., fol. 37), as shown in Appendix G, (App. 66 to 70), but this was denied and shown to be untrue by affidavit in reply, (Appendix G, App. 71 to 74).

92. Judd's affidavit, (App. 71 to 74), is contradicted by the undenied allegations in the amended petition of August 8, 1942.

93. Following the hearing of a motion of the City of New York to enjoin your petitioner's son from pursuing his rights in the State Court and your petitioner's petition, The City *et al.*, via Chester F. Leonard, wrote a letter, in the nature of pleadings, to Judge Hulbert, (Appendix H, App. 78 to 82), and your petitioner replied thereto by affidavit, (Appendix H, App. 75 to 77).

94. Your petitioner respectfully calls attention to averment 6, (App. 76 and 77), challenging, in precise terms, the District Court's unwarranted assumption of authority over the subject matter of the so-called Unification Plan

and, consequently, the validity of all of Judge Patterson's orders issued to effectuate the plan, including the validity of the terms of the order confirming the foreclosure sale under the Interborough mortgage.

95. The omission of Appendices F, G and H from the papers submitted to the Circuit Court in connection with the oral motion on April 12, 1943, (Rec., fol. 1), and with the affidavit of Daniel James included in the Record at folios 5 to 20, constitutes chicanery on the part of the City *et al.*

96. Your petitioner submits: *It is chicanery to suppress the fact of the existence of the undecided fundamental questions as to the matters of authority and jurisdiction of the court below and thereupon ask the Circuit Court to which appeal is pending, in respect to said questions,* (among others), *to summarily affirm the action of the court below, taken* by the latter, *without adjudication of the fundamental questions.*

97. Your petitioner respectfully calls attention to his pleadings in the District Court shown in the Record at folios 23 to 25 inclusive; and to Appendix D, the stenographic minutes of the hearing in respect to his said pleadings, (App. 40 to 49 inclusive).

98. Your petitioner respectfully calls attention to Appendix C, (App. 19 to 39 inclusive), and respectfully submits that consideration thereof is needed to see what was actually decided by the decision in the controversy between Murray and Roberts and the mandate and order on the mandate which constitute Appendix B.

(h) The Refusal of the Circuit Court to Decide the Unanswered, Fundamental and Precise Questions of Authority and Jurisdiction Drawn To Its Attention.

99. Attention is respectfully called to folio 12 of the Record commencing with the fifth line from the bottom of page 9; and to your petitioners averments 72, 77, 78 and 79 above.

100. It is respectfully submitted that: the fact that Judge Patterson characterized the Interborough Receivership proceedings as very complex did not absolve him from performing the judicial duties imposed on him by the mandate exhibited in Appendix B. See *Cohen* v. *Virginia*, (6 Wheaton 264, 404).

101. The fact that Judges Swan, Augustus N. Hand and Clark found your petitioner's contentions quite difficult to grasp did not absolve them from their judicial duty to decide the merits of the claims petitioner appeared to make. *Cohen* v. *Virginia, supra.*

102. Attention is respectfully called to folios 13, 14 and 15 of the Record, anent the petition for certiorari and supporting brief and, also, to the possibility that the petition may have been premature, for the reason that dissolution of the Interborough Receivership and ancillary Manhattan Receivership and discharge of the receivers had not taken place; thus leaving the way open to the petitioner to pursue his rights in the receivership court.

103. Attention is respectfully called to folios 46 to 51 inclusive. This, your petitioner's affidavit, was evoked by the notice of motion based on James' affidavit appearing in the Record at folios 1 to 20.

104. Your petitioner's affidavit, (Rec., fols. 46 to 51), was filed by the Circuit Court on April 30, 1943 with its

Order of Affirmance, (Rec., fols. 52-53); but it was sworn to by your petitioner on April 12, 1943. It was handed to the Circuit Court after The City *et al.* had made the motion, (to summarily affirm Judge Hulbert's order refusing to proceed in accordance with the mandate exhibited in Appendix B), and argument of same on the basis of James' affidavit, (Rec., fols. 5 to 20) had been made.

105. The Circuit Court expressed its decision orally on the conclusion of the argument based on James' said affidavit.

106. Your petitioner, nevertheless, presented his affidavit and ventured to argue it; but no attention was given to the averments of his affidavit and argument based on same, nor to the argument as to the impropriety of summarily affirming any order of the court below where:

> "Appellees' motion herein does not furnish the complete pleadings in connection with Appellant's petition below; wherefore, Appellees have failed to demonstrate that the questions raised by the appeal herein,—and there are several—are '*res adjudicata*', and therefore, unsubstantial." Record, page 42, folio 48.

107. By summarily affirming Judge Hulbert's decision and order, (Rec., fols. 42 to 45), the Circuit Court refused, the fourth time, to pass on the fundamental and precise question of authority to disaffirm the Manhattan Lease because of the provisions of Section 24 of the Rapid Transit Act (exhibited as Appendix A) and referred to in the Record at folios 24, 25 and 35.

108. By disregarding your petitioner's averments in his affidavit handed to the Circuit Court on April 12, 1943, (Rec., fols. 46 to 51 inclusive), particularly averment 3, and that part of averment 6 which reads:

> "The Unification Plan, by its terms, was devised by the Transit Commission, a state administrative body,

and adopted by it on August 29, 1939 under the authority vested in it by the laws of the State of New York. On August 31st the Plan of Unification became a contract between the four appellees on the motion herein according to the terms thereof. On November 22, 1939, the contract became operative because additional parties necessary thereto, to form a complete contract, had accepted the Plan insofar as they were severally concerned; and, on the said date, the Transit Commission ordered the contract operative pursuant to the authority vested in it by the State of New York. See Manheim Record on Appeal, pp. 60 to 166, inclusive, and pp. 385 to 387, inclusive, Cause 122 F. (2d) 454."

* * *

"The District Court having no authority to prevent the purchase by the City of the securities sold to it in accordance with said contracts, its decrees and orders, approving and ordering consummation thereof, are without effect as a matter of law, and cannot constitute *'res adjudicata'*."

and that part of averment 6 which reads:

"* * * since there is evidence that among the questions to be presented on the appeal there are substantial questions of law and fact, the motion to summarily affirm the Order of the Court below should be rejected."

the Circuit Court refused to decide the unanswered, fundamental and precise questions of authority ~~and~~ jurisdiction of the District Court over the contract for acquisition of securities by The City of New York, drawn to its attention.

The verbal motion on behalf of The City of New York, Van S. Merle-Smith and others, J. P. Morgan and others and Guaranty Trust Company of New York, and J. Herbert Case and others, made pursuant to the Notice of Motion, (Rec., fol. 1), was granted and the Order of Affirmance was made on April 30, 1943, (Rec., fols. 52-53).

An order dated July 28, 1943, was signed by Associate Justice of this Court, Stanley Reed, whereby the time

of your petitioner for filing this petition for certiorari and for such other writ or writs for the exercise of this Honorable Court's jurisdiction, agreeable to the usages and principles of law, was extended to and including August 6, 1943.

The nature of the case is that: the Circuit Court has so far departed from the accepted and usual course of proceedings and, also, sanctioned such departure by the lower court, as to call for the exercise of this Court's powers of supervision, agreeable to the principles, and usages referred to in *Cohen* v. *Virginia*, (6 Wheaton 264, 404).

No opinion was delivered by the Circuit Court in connection with its said order of April 30, 1943.

The original certified copies of Appendices B to H inclusive are filed herewith. Appendix A is identical to an Appendix A annexed to your petitioner's main brief in the so-called Manheim appeal 122 F. (2d) 454.

Statement of Supreme Court's Jurisdiction to Review the Decree in Question and to Issue Other Writs, Agreeable to the Usages and Principles of Law.

The jurisdiction of this Court to review the order of the Circuit Court of Appeals, summarily affirming the order of the District Court of the United States, for the Southern District of New York, on December 28, 1942, and such other writs for the exercise of this Court's jurisdiction, agreeable to the usages and principles of law, is found in Sections 240 and 262 of the Federal Judicial Code as amended.

The Questions Presented.

1. Was it proper for the Circuit Court to summarily affirm the order of Judge Hulbert of December 28, 1942, pursuant to this Court's Rule 7, subdivision 4, (Rec., fol. 6), where it was duly advised that all the pleadings in the court below had not been placed before it, (Rec., fol. 48), and it did not inspect the missing pleadings before deciding.

2. Was it proper for the Circuit Court to summarily affirm said order of Judge Hulbert, where it was duly advised, (Rec., fols. 46 to 51), that the court below had left unanswered the precise and fundamental questions of the authority and jurisdiction of the court below to have proceedings and issue orders and decrees in the matters which it, the District Court, held to be "*res adjudicata*".

3. Should the Circuit Court have decided to hear your petitioner's appeal.

4. Are the Circuit Court and the District Court so prejudiced against your petitioner that the case should be reviewed and decided by this Honorable Court on a record to be furnished on appropriate settlement thereof.

5. Should this Court's powers of supervision be so exercised by this Court as to discipline, according to the principles and usage of law, the courts below and the counsel who have not properly comported themselves in the Interborough Receivership, according to said principles and usages.

6. Should the injunctions against bringing actions in respect to matters involved in the Interborough Receivership and against parties therein, issued by the District Court in connection with approving and ordering the

so-called Plan of Unification be vacated insofar as the injunctions affect Manhattan Railway Company, your petitioner and others similarly situated.

The Reasons Relied On for the Allowance of Writ of Certiorari and Other Writs Appropriate in the Premises.

(a) The Circuit Court of Appeals has decided or interpreted Rule 7 subdivision 4 in a manner which appears to be contrary to its intent and purpose.

(b) The action of the Circuit Court and the District Court is in violation of the provisions of the Constitution in that they operate to deprive Manhattan Railway Company, your petitioner and others of their property without due process of law, as provided in Article VII, Sections 123 and 124 of the Public Service Law of the State of New York.

(c) The action of the District Court in refusing and neglecting to have the proceedings according to the Mandate in *Murray* v. *Roberts* (Appendix B) was contrary to established principles and usages of law.

(d) The action of the District Court in having proceedings and issuing orders in respect to the contract of The City of New York to acquire securities from those severally accepting The City's offers for their securities was contrary to the established principles and usages of law.

(e) The foreclosure and sale of Manhattan Railway Company's assets, under the company's Consolidated Mortgage constitutes a fraud on Manhattan Railway Company, your petitioner and others similarly situated.

(f) The conduct of the District Court in managing the Interborough Receivership constitutes cause to impair the faith which should repose in the public in regard to the integrity of the Federal Receivership Courts.

(g) The conduct of the Circuit Court in respect to the appeals taken to it in the Interborough-Manhattan receiverships constitutes cause to impair the faith of the public in regard to its integrity.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals of the United States for the Second Judicial Circuit, to send to this Court for its review and determination on a day certain to be named, a true and correct copy of the record and proceedings in the District Court, such as would have been filed in the Circuit Court on the appeal to the Circuit Court by your petitioner, taken on March 27, 1943, (Rec., fol. 6), if the Circuit Court had not issued its Order of April 30, 1943, (Rec., fols. 52-53); and that such further writ or writs be issued out of and under the seal of this Honorable Court to the said Circuit Court, the District Court of the United States for the Southern District of New York, and the parties involved in the Interborough-Manhattan receiverships as in the opinion of this Court are fitting; and that your petitioner may have such other and further relief as to this Honorable Court may appear meet and just.

And your petitioner, as in duty bound, will ever pray.

SOLOMON G. SALOMON,
Pro se.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

SOLOMON G. SALOMON,

Petitioner,

—against—

THE CITY OF NEW YORK, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND OTHER WRITS AS IN THE OPINION OF THE SUPREME COURT OF THE UNITED STATES ARE FITTING.

Opinions.

No opinion was entered by the Circuit Court of Appeals, for the Second Circuit, in connection with its order summarily affirming the order of the court below it (Rec., fols. 52-53). The opinion and order of the District Court which were so affirmed are printed at folios 42 to 45 of the Record (pp. 38 to 40).

The affirmed opinion, (and order), relies on the District Court's order of August 25, 1941, discharging Interborough Receiver Murray, (Rec., fols. 21 and 22) and its opinion and decision of October 21, 1941, (Rec., fols. 26 to 28) to deny my petition (Rec., fols. 23 to 25) to amend said order of August 25, 1941.

Jurisdiction.

Writ of certiorari is prayed pursuant to the authority of Section 240 of the Judicial Code and other writs as in the opinion of this Court are fitting, are prayed pursuant to this Court's authority under Section 262 of the Judicial Code.

The reasons relied on for the exercise by this Court of its judicial powers under the cited sections of the Judicial Code have been stated under the appropriate sub-heading of the petition (p. 42).

Specifications of Error.

1. That the Circuit Court of Appeals for the Second Circuit erred in applying Supreme Court Rule 7,4 otherwise than in accordance with the intent and spirit thereof, in a manner repugnant to settled principle and custom, and by abusing its discretion, if any, in such cases.

2. That said court erred in not applying an informed judgment, informed if it wished to be informed by the affidavit printed at folios 46 to 51; and capable of being further informed by calling for the originals of the papers exhibited herewith as Appendices F, G and H.

3. That said court erred in not applying Section 24, subdivision 3, of the Rapid Transit Act, to the questions which it should have considered and decided.

4. That said court erred in not deciding the unanswered questions of the District Court's authority over the contract whereby The City of New York contracted to acquire securities of the Manhattan Railway Company and Interborough Rapid Transit Company.

5. That said court erred in not deciding that the District Court, after the decision and mandate in *Murray* v.

Roberts had no right to have proceedings for the foreclosure and sale of the Manhattan assets under the Manhattan Consolidated Mortgage, and in not deciding that the foreclosure and sale had, are null and void as against Manhattan Railway Company, your petitioner and others similarly situated.

Statement of the Case.

The statement of the case is contained in the Foreword and Statement of the Case in the petition.

Argument.

Errors 1 and 2.

It is submitted, that Supreme Court Rule 7,4, on its face, is intended to be applied only in a case where the appeal is taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

Decisions as to unanswered questions concerning application of state law, and concerning the authority and jurisdiction of the court below as to the matters wherein it has had proceedings and the validity of its orders and decrees issued in such proceedings, obviously, are not to be considered unsubstantial, especially where these questions are involved in the question of *res adjudicata*. The principles and usage applicable in such cases are so well known to this Court that it is unnecessary to cite any cases or authorities.

Besides, the record is barren of any showing that your petitioner's appeal was taken for delay only.

Therefore the Circuit Court erred in summarily affirming the order of the court below it, without informing itself as to the actual case; where it could have informed itself, had it heeded the affidavit before it and printed at folios 46 to 51 of the Record, and examined the originals of Appendices F, G and H.

Error 3.

The principle and usage of applying the law of the state applicable in the case is too well established to need citation of law or authority.

Therefore the Circuit Court erred in failing to apply Section 24 of the Rapid Transit Act where the District Court failed to do so.

Error 4.

The principle and usage that jurisdiction or authority of a contract is not to be assumed by a court where there is no action and merely on the solicitation of the parties thereto is firmly established in the jurisprudence of this nation.

The principle that a court has no jurisdiction or authority when these are vested by law of a state in a state administrative body is also firmly established so as to require no citations.

Therefore the Circuit Court erred in failing to pass on the questions of authority and jurisdiction which were squarely put before it.

Error 5.

After the decision and mandate in *Murray* v. *Roberts* (103 F. (2d) 889) it was contrary to established principle and usage, for the District Court to have any proceedings not within the spirit and letter of the said decision and mandate, in respect to the Interborough Equity Receivership and the ancillary Manhattan receivership. *Pocono Rubber Cloth Co.* v. *J. A. Livingston Inc.* (92 F. (2d) 290, 291) and cases cited therein.

The foreclosure and sale of the Manhattan assets are, admittedly, in pursuance of the so-called Unification Plan,[n1] and not in pursuance of the mandate in *Murray* v. *Roberts*. The Plan did not exist at the time of the mandate.[n2]

n1 - 122 F 2d, 454 at pp 456 and 7.
n2 - 122 F 2d, 454 at p 456

Therefore the Circuit Court erred in not enforcing its mandate in *Murray* v. *Roberts* (Appendix B) and not vacating the foreclosure and sale of the Manhattan assets.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that all the errors of the Circuit Court and the District Court be corrected, as prayed for in your petitioner's petition.

Respectfully,

SOLOMON G. SALOMON,
Pro se.

(2966)

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Supreme Court of the United States

October Term, 1943. No. 243

SOLOMON G. SALOMON,
Petitioner,

against

THE CITY OF NEW YORK, *et al.*

Office - Supreme Court, U. S.
FILED
SEP 9 1943
CHARLES ELMORE CROPLEY
CLERK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

September 2, 1943.

PAXTON BLAIR,
LEO BROWN,
of Counsel.

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CLIFTON MURPHY,
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EDWIN S. S. SUNDERLAND,
Solicitor for A. M. Anderson and Others as a Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and Guaranty Trust Company of New York as Trustee.

PHILIP A. CARROLL,
Solicitor for J. Herbert Case and Others as a Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

Supreme Court of the United States

October Term, 1943. No. 243.

SOLOMON G. SALOMON,
Petitioner,

against

THE CITY OF NEW YORK, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner is a holder of 7% Guaranteed Stock of Manhattan Railway Company (hereinafter referred to as "Manhattan"). He seeks the reinstatement of equity receivers for Interborough Rapid Transit Company (hereinafter referred to as "Interborough") and Manhattan, both of whom were finally discharged in August and September, 1941, or the appointment of successors of such receivers, so that they may negotiate with each other and with the City of New York for a lease covering the Manhattan elevated railroad properties (R. 4, 28-29, 38).* These properties were acquired by the City in unification on June 12, 1940, and most of them have since been razed. Petitioner's position is that such negotiations must be carried out pursuant to the mandate of the Circuit Court of Appeals, Second

* The history and complexity of the legal relations between Interborough, Manhattan, their respective security holders and the City, are fully set forth in *Murray* v. *Roberts*, 103 F. (2d) 889 (2nd Circ., 1939) and *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454 (2nd Circ., 1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942), and in the interest of brevity will not be restated here.

Circuit, in the Interborough-Manhattan lease litigation, *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940). The District Court denied the application with an opinion (R. 38-40), and an order, dated December 28, 1942, was entered thereon (R. 40). Upon petitioner's appeal from this order to the Circuit Court of Appeals for the Second Circuit, respondents made a motion for an order affirming the order of the District Court pursuant to Rule 7, par. 4, of the Rules of this Court * and Rule 7 of the Circuit Court of Appeals (R. 1). That Court granted the motion without opinion and entered an order, dated April 30, 1943, affirming the order of the District Court (R. 44).

(1)

Petitioner has pinned his hopes in this proceeding on a single sentence in the opinion of the Circuit Court of Appeals in *Murray* v. *Roberts, supra,* 103 F. (2d) 889, pet. for cert. dismissed, 311 U. S. 720. After reviewing the franchise obligations of Interborough to the City—not to Manhattan or its security holders—the opinion of Judge Learned Hand concludes (103 F. [2d] at pp. 897-898):

> "He [the Interborough receiver] will reject the Manhattan lease if he is able to perform the foregoing obligations to the City by any other means than affirmance of it; but if after negotiations with the Manhattan and with the City no other means is possible than affirmance of the lease, he must affirm the lease."

Apparently, petitioner seems unable to realize that only to the City was this decision a vindication of rights—that

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* Rule 7, par. 4, provides: "The Court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

to him (as a Manhattan security holder) it was a mere windfall. He ignores completely Judge HAND's admonition in discussing the disaffirmance issue as it affected Manhattan alone, without benefit of the City's protection (103 F. [2d], at p. 891):

> "It is an issue on which the Manhattan should not be heard; it concerns only the internal policy of the creditors and shareholders of the Interborough, in which the Manhattan, as lessor, may not intervene: the determination whether to perform, or to leave the obligee to its remedies, is to be made solely in the interests of the Interborough."

Petitioner's present attempt to obtain a review by this Court is but another instance of the monotonous persistence with which, on every occasion, he (a layman) has pressed for acceptance of his peculiar personal views of the complicated disaffirmance issue, whether or not that issue was before the Court and even after it had been fully disposed of. The Circuit Court of Appeals has had occasion to take note of his tendency in this regard.*

(2)

Our contention that the issue sought to be raised by petitioner is so unsubstantial as not to merit review by this Court rests upon two principal grounds:

(a) The rights of all parties to the receivership cause, including this petitioner as a holder of Manhattan 7% Guaranteed Stock, were completely and finally settled and adjudicated by the orders and decrees underlying the Unification Plan, affirmed in *American Brake Shoe & Foundry Co.* v.

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* See *Manhattan Railway Company* v. *Central Hanover Bank & Trust Company*, 99 F. (2d) 789, 793 (1938), cert. denied, 306 U. S. 641 (1939) and *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454, 461 (1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942).

Interborough Rapid Transit Co., 122 F. (2d) 454 (2nd Circ., 1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942). The appellants on that appeal were this petitioner and one Manheim, and that decision will be referred to herein as the Salomon-Manheim appeal.

(b) The issue now sought to be raised by petitioner was again disposed of in the District Court in connection with the final discharge of the Interborough receiver. Petitioner then asked that the order of discharge reserve his asserted rights under his personal views of the disaffirmance issue, and he subsequently sought to have the order amended for the same purpose. His request was denied, and he did not appeal, either from the order of discharge or from the order denying his motion to amend.

(a)

At the threshold of petitioner's case is the fact that he asserts his claim as a holder of Manhattan 7% Guaranteed Stock (R. 24-25). In order to give even the slightest color to his appeal, he would have to show claims of that stock which have not been disposed of, but which are still outstanding and undetermined. And any possibility that such showing can be made is emphatically negatived by the decision in the Salomon-Manheim appeal.

Since the salient facts relative to the Salomon-Manheim appeal and the nature of the decision thereon appear fully in the record (R. 6-13), we shall not repeat them here. It is sufficient to point out that one of the orders affirmed on that appeal was Judge PATTERSON's order of March 15, 1940, settling the Interborough-Manhattan claims. That order allowed a definite dollar amount to be collected in cash by each holder of Manhattan 7% Guaranteed Stock on his claims against Interborough, its receiver, its receivership estate, and its security holders. That order freed the Inter-

borough properties and the proceeds of their sale from all such claims. That order also extinguished such claims and enjoined their further assertion in any Court. A more complete disposition of every phase of the claims here asserted by petitioner is impossible to imagine. The District Court (over which Judge PATTERSON presided), however, went even further: in its order of June 12, 1940, which reaffirmed a prior finding of the fairness of the Unification Plan and ordered the consummation of the Plan, it again enjoined further attempts by Manhattan stockholders, among others, to enforce their claims.

The two foregoing orders were reviewed by the Circuit Court of Appeals, Second Circuit, on the Salomon-Manheim appeal, with this petitioner in the capacity of an appellant. The orders were affirmed, and this Court denied a writ of certiorari. The Circuit Court's opinion was written by Judge SWAN, and the relevant parts thereof have already been referred to (R. 8-10). We call attention here only to the concluding portion of the opinion, which, we submit, completely disposes of petitioner's present contentions (122 F. [2d], at p. 461):

> "The contentions of appellant Salomon, a layman arguing his own case in a proceeding which Judge Patterson characterized as the most complex he had ever encountered, are quite difficult to grasp. In so far as they can be understood we agree with respondents that they constitute in substance a reargument of the disaffirmance issue, Salomon claiming, as a holder of Manhattan securities, that the rental obligations of Interborough to Manhattan should have been carried out to the letter. He further appears to contend that the certiorari proceedings in Murray v. Roberts, 2 Cir., 103 F. 2d 889, on the disaffirmance question should have been prosecuted fully and that any compromise of the vexatious questions involved was improper. As we have indicated in the treatment of the appeal of Manheim, we conclude that the

> Settlement Proceedings resolving the conflicting claims of Manhattan and Interborough were properly instituted and concluded and should not be set aside; and certainly we shall not, in any event, decide the merits of such claims as this appellant appears to desire. These issues have wisely been set at rest."

Petitioner sought to raise the same disaffirmance issues in his unsuccessful attempt to obtain certiorari from this Court. The quotations from his petitions for a writ and for a rehearing cited in the record (R. 10-13) are most revealing. They indicate clearly that petitioner is motivated by disgruntlement concerning the disposition which has been made of the disaffirmance matter rather than by a legitimate desire to obtain a decision upon an undecided point. More important still, they show that petitioner emphatically presented his present point as to the disaffirmance litigation, exhausted his remedies, and has had his day in court.

(b)

In connection with the entry of the order of the District Court on August 25, 1941, discharging the Interborough receiver, petitioner sought to reserve the alleged rights which he now asserts. He was unsuccessful in securing any such reservation (R. 13-15, 16-23). He did not appeal from the order of discharge, and the time to appeal has, of course, expired.

He subsequently moved under date of September 22, 1941, to amend the order of discharge in order to provide that the alleged benefits which he claims from the decision in *Murray* v. *Roberts, supra,* "be preserved for Manhattan Company, petitioner and others" (R. 21). This motion was likewise denied. The District Court wrote an opinion dated October 21, 1941 (R. 21-23) in which it was stated that the questions sought to be raised by this petitioner had already been disposed of, and that Salomon's remedy should have

been by way of appeal. The Court further quoted from Judge SWAN's opinion in the Salomon-Manheim appeal to show that Salomon's rights had already been fully adjudicated.

Conclusion.

The petition for a writ of certiorari should be denied.

September 2, 1943.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Solicitor for the City of New York.

PAXTON BLAIR,
LEO BROWN,
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DANIEL JAMES,
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EDWIN S. S. SUNDERLAND,
Solicitor for A. M. Anderson and Others as a Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and Guaranty Trust Company of New York as Trustee.

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GUY CARY,
CLIFFORD M. BOWDEN,
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FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 243

SOLOMON G. SALOMON,
Petitioner,

v.

THE CITY OF NEW YORK, *et al.*,
Respondents.

REPLY TO BRIEF IN OPPOSITION

SOLOMON G. SALOMON,
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18 Pine Street,
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APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3242

SUPREME COURT OF THE UNITED STATES

October Term, 1943—No. 243

Solomon G. Salomon,
Petitioner,

v.

The City of New York, *et al.*,
Respondents.

REPLY TO BRIEF IN OPPOSITION

The City of New York *et al.* are hereinafter called respondents.

First

Respondents' introductory statement stating, among other things, that petitioner seeks that Interborough and Manhattan receivers "negotiate with each other and with the City of New York for a lease of Manhattan railroad properties" is palpably not the truth. So is the case of the footnote coupled thereto by asterisk and of the statement as to petitioner's position.

Petitioner's Actual Position and Goal

Petitioner recorded and pleaded his actual position on February 23rd, 1940. See his allegation 64 on pages 20 and 21 of entitled petition, and, as indicated in allegation 65, the files of this Court in 315 U. S. 801 (1942). He then, and ever since, has maintained that the original Manhattan lease could not, and cannot be, disaffirmed because of the Laws of New York and the decision in *Murray* v. *Roberts,* 103 F. (2d) 889. See R. p. 33, allega-

tion 21; p. 34, allegations 27, 31, and 33; and p. 35, allegations 34 and 38; and pp. 19 and 20, allegations 7 to 12 inclusive. See Appendix D, App. 41, also omitted pleadings Appendix F, Allegation VIII, App. 64, and Appendix G, Allegation E, App. 73.

Since the records show petitioner's position is that the original Manhattan lease was never disaffirmed and could not be disaffirmed, it is, manifestly, not the truth that his goal is that Murray and Roberts, or substitutes for them, negotiate for any lease.

As hereinbefore shown, petitioner recorded and pleaded his actual position on February 23rd, 1940. As shown by Appendix D, he has always maintained that the District Court has not performed its duties in respect to that part of the Interborough Estate which is subject to its authority, and which the Court ordered distributed, purportedly temporarily, on account of Interborough bonds, under numerous interim orders issued during eight years; and that it could not do so by turning over the other parts of the Estate to the City. Furthermore, petitioner maintains that the foreclosure of the Manhattan Consolidated Mortgage is without authority and power in equity and law, and must be vacated because it is not a valid conveyance of title of ownership of Manhattan property to Merle-Smith *et al.* and by them to the City. See Reasons Relied on, (b) and (e), Petition, p. 44.

Petitioner's goal is to have the District Court do its duty, and (1) enter an order, fixing, as a matter of record, that the Manhattan Lease could not be, and was not, disaffirmed, and that the obligations of the lease rank as operating expense of the Interborough Estate and prior to service on Interborough bond; (2) order that the rentals actually and necessarily payable under the Manhattan Lease, and impounded by Central Hanover National Bank & Trust Company, must be collected and applied as provided in the lease and in the indenture of the Manhattan Consolidated Mortgage; (3) enforce said collection and application; and

(4) set aside the title of the City to any Manhattan properties granted under the foreclosure of the Consolidated Mortgage, and fix, by record, that vesting of title in the City to any Manhattan property can be lawfully attained only as provided by Sec. 123 of the Public Service Law of the State of New York.

It is not the truth that the legal relations between Interborough and Manhattan or their respective security holders are complex and fully set forth in the two opinions in said footnote; nor is it the truth that the history of said relationship is fully set forth in said opinions.

The legal relationship between the Interborough and Manhattan companies and the respective receivers are those of tenant and landlord, under the undisaffirmed Manhattan Lease. The fact that the lease could not be disaffirmed does not alter such relationship.

The relationship between Interborough and the State and the City is or was somewhat involved; but it is not difficult to understand. Interborough's business was to operate, under state laws and franchises from the State, leased railroads, owned by Manhattan and owned by the City of New York respectively, and connected by railroads which Interborough constructed under franchises to create through routes. The last mentioned franchises exacted, that each of the routes so created must be operated as if it were an original route (Appendix A, App. 6). The required condition precedent to the grant of these franchises (for the connecting railroads and to operate the through routes so created), was that Interborough possess the Manhattan Lease (Appendix A, App. 1). The franchises are mandatory in respect to operation, *Murray* v. *Roberts, supra.*

The franchises granted to Interborough and permitting it to create aforesaid routes, contained the condition that, following taxes, the first payments payable out of the gross revenues of the said routes, were to be the rentals

actually and necessarily payable under the Manhattan lease and those payable for use and occupancy of other properties included in the routes. The City and Interborough wanted Manhattan to consent to the mandatory franchises and Manhattan consented. Therefore it is entitled to the benefit of said condition.

Certainly, at least, the pleadings in *Murray* v. *Roberts,* and the franchises shown to this Court in the record of that case, should be examined for a full exposition of the said legal relationship. The relationships are also dealt with in certain New York cases and in *Gilchrist* v. *I. R. T. Co.* (279 U. S. 159).

Respondents, in the introductory statement, also refer to Judge Hulbert's opinion (R. 38-40) and the order thereon (R. 40). It should be noted, both historically and factually, that Judge Hulbert erroneously cited 10 Fed. Supp., 512 (a decision by Judge Mack in 1935), as having been modified by *Murray* v. *Roberts,* 103 F. (2d) 889. The record on file in this Court in 311 U. S. 720 (1940), will vouch for the fact that it is an unreported decision and order by Judge Patterson in 1938 which was modified. This is also evident from two parts of Appendix B, App. 8-18.

Second

As to Respondents' Argument (1)

Respondents set up false premises for this argument, as false as their statement of petitioner's position and what he seeks. Moreover, they remove the alleged admonition by Judge Hand from its context. The alleged admonition consists of some remarks about the issue of whether continuance of the Manhattan lease would be a burden to the Interborough. Judge Hand remarked that the issue was coupled to a request that the decision in *Murray* v. *Roberts* be delayed until after decision of the issue. Evidently, the decision in *Murray* v. *Roberts* was not delayed as requested, and did not depend on the alleged admonition.

The decision in 103 F. (2d) 889 is that Murray (the Interborough Receiver, and in the last analysis the District Court), must keep the respective franchises which permitted Interborough to build extensions of the Manhattan-owned lines and to construct additional tracks on said lines. These franchises which permitted Interborough to operate the extensions and the additional tracks in conjunction with said lines and parts of City-owned lines as original Interborough routes, Judge Hand said, must be preserved against forfeiture. The mandate commanded that the franchises be preserved, in the absence of other means, by affirmance of the Manhattan Lease. The exact instructions, aside from the aforesaid, were, according to the decision, to be determined in proceedings as to other means than the lease by which Interborough's franchise obligations could be performed by Murray.

Obviously, performance of this command by the higher court was within the authority and power of the District Court. Performance, obviously, would have involved determination of the rights in and to $82,442,562.31 (Appendix F, Allegation VII, App. 64), paid on account of Interborough Bonds, contrary to Roberts' prayers (Manhattan Receiver, custodian of the rights involved), which money included unpaid rentals under undisaffirmed lease (see Mandate, Appendix B, "8", App. 12, and prayers in Appendix C, App. 38). Since said money is part of the Interborough Estate and was not acquired by the City under the Unification Plan, petitioner submits that adjudication of the rights in and to said $82,442,562.31 is an unperformed duty, even if the District Court had jurisdiction of the Unification Plan, question as to which remains unanswered.

Petitioner pins his hopes for adjudication of the rights in and to said money on his "monotonous persistence", which shows his complaint was brought on March 31st,

1933, by Roberts, Manhattan Receiver (Appendix C, App. 19-39), and that the Palmer Committee continued as shown by *Palmer* v. *Guaranty Trust Co.*, (111 F. (2d) 115). See petition p. 19, allegations 57 to 60 inclusive. This Court citing *Cox* v. *Stokes* (156 N. Y. 491, 511), approved similar "monotonous persistence" in *Bogert et al* v. *Southern Pac. Co.* (250 U. S. 483 at 489-490).

Petitioner submits, that his failure to discover the appropriate remedy for his grievance does not constitute laches; and he submits that defendants' rights have not been prejudiced by delay. *Bogert et al* v. *Southern Pac. Co., supra,* p. 490.

Petitioner hopes for allowance of review by this Court because it is evident that the District Court refused to do its duty,—to enter a decree in conformity with the decision in 103 F. (2d) 889 and with the mandate which went down to it, *Pocono Rubber Cloth Co.* v. *J. A. Livingston Inc.* (92 F. (2d) 290, 291). It is also evident that the Circuit Court, by dismissing petitioner's appeal to it, sanctioned such departure and, thereby, itself departed from duty. The departures are contrary to the principle enunciated in *Cohen* v. *Virginia* (6 Wheaton 264, 404), that failure by court to do its duty is in derogation of the Constitution which the court is sworn to uphold. Therefore petitioner believes he could do no less than petition this Court to exercise its powers of supervision in the premises, and for review.

Third

As to Respondents' Argument (2) (a)

Respondents allege that the orders and decrees of the District Court, issued March 15th and June 12th, 1940, in respect to the Unification Plan, underlay the Plan; that these were affirmed in 122 F. (2d) 454; and that petitioner's rights were adjudicated by said orders and decrees.

This Court, by examining page 63 of the Transcript of Record on the appeal in 122 F. (2d) 454, will find that the Unification Plan is there represented to have been erected by the Transit Commission on the foundation of the Public Service Law of New York and the State Constitution, in accordance with same; and, on pages 385-7 thereof, that the Commission ordered and declared the Plan operative on November 22, 1939, pursuant to said law and the terms of the Plan.

It is, therefore, evident that the orders and decrees of the District Court do not underly the Plan. Furthermore, it is evident that, until the questions of authority and power of the District Court over the Plan are answered, it cannot be taken for granted that the Circuit Court did not affirm orders and decrees of the District Court in respect to a contract for acquisition of securities, over which the District Court did not possess authority or power conferred by Law.

Petitioner does not take the position that the District Court could not turn over the Interborough Plan Properties (see Transcript of Record in 122 F. (2d) 454, pp. 72-76), including the "Existing Agreements of the Interborough Company" known as the undisaffirmed Manhattan Lease, via foreclosure of the Interborough Mortgage and Section 123 of the Public Service Law of New York, and in the light of the decision in 111 F. (2d) 115. Petitioner's position is that neither acquisition by the City of securities, nor any orders and decrees in connection therewith, can constitute an adjudication of Manhattan Company's and his rights in and to that part of the Interborough Estate, amounting to $82,442,562.31 (Appendix F, Allegation VII, App. 64) not included in Interborough Plan Properties.

As to Respondents' Argument (2) (b)

This argument amounts to assertion that the District Court could discharge itself from its unperformed duties

as trustee in possession of the Interborough Estate, as Receivership Court, by discharging its agent, the Interborough Receiver.

Petitioner submits it is a truism that no judge or court can divest himself or itself of his or its duties, except by his or its actual discharge of the duties.

It was, and is, beyond doubt, the District Court's duty to fully administer that part of the Interborough Estate amounting to said $82,442,562.31 in accordance with its repeated promises made in the interim orders issued in December 1932 and periodically thereafter (see Appendix F, Allegation 6, I, B. App. 61-62). This duty should be discharged in the light of the decision and mandate in *Murray* v. *Roberts, supra.* The allegedly approved Unification Plan did not contemplate or provide for payment of said money to the City, nor for adjudication by judicial ascertainment of the rights in and to said money; and, obviously, the Plan could not displace the provisions of the said interim orders.

Petitioner's position is that the City was the real owner of the Securities deposited under the Unification Plan; that, since the alleged parties to the so-called compromise represented the deposited securities and since they effectuated such compromise after such deposit, it is apparent that the alleged compromise was made by the City for the City and that, therefore, the compromise is not binding on non-depositors, or on Manhattan Railway Company.

CONCLUSION

Respondents have not presented any good reason why the petition should not be granted.

Respectfully submitted,

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Petitioner pro se.